U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 09 July 2003

BALCA Case No.: 2002-INA-144
ETA Case No.: 1996-CA-09046509/AT

In the Matter of:

SCORE AMERICAN SOCCER COMPANY,
Employer,

on behalf of

JOSE DORE MEMBRENO,
Alien.

Appearance: Ruben R. Gomez, J.D.
Santa Monica, California
For the Employer

Certifying Officer: Rebecca Marsh Day
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of "Machine Maintenance Mechanic."[1] The CO denied the application and Employer requested review

[1] Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20

pursuant to 20 C.F.R. §656.26.

STATEMENT OF THE CASE

Employer, Score American Soccer Company ("Employer"), filed the above-referenced application for labor certification on August 2, 1995, to enable the Alien, Jose Dore Membreno ("Alien") to fill the position of machine maintenance mechanic. (AF 25). The job description, in pertinent part, required familiarity with "Overlap, Singlestitch, Pressers, Tass, Challenger, M & M, Oval, Bates, Monty Antonio, Viking America, Embroidery Tajima, packing machines, etc." (AF 25).

The CO issued a Notice of Findings ("NOF") on April 8, 1998, proposing to deny certification because the requirement of familiarity with Overlap, Singlestitch, Pressers, Tass, Challenger, M & M, Oval, Bates, Monty Antonio, Viking America, and Embroidery Tajima was considered an unduly restrictive requirement in violation of 20 C.F.R. §656.21(b)(2). (AF 22). The CO noted that it was not customary for employers to require knowledge, skills and abilities in brand name equipment, as such knowledge sets up artificial barriers to hiring job applicants. (AF 24). Furthermore, the ETA 750B showed that Alien had gained this experience with Employer, and did not have the experience prior to his employment with Employer. The CO also pointed out that the brand name machinery was not referenced in the newspaper advertisements, and therefore, readers of the advertisements would not have prior knowledge that familiarity with specific brand name equipment was required. (AF 24).

Employer was advised that it needed to justify the requirements by "business necessity" or delete same and re-advertise. Alternatively, Employer could show that the requirement was a common one for the occupation in the United States, and should not be considered a restrictive requirement. Establishing business necessity required more than producing evidence that the

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C.F.R. §656.27(c).

requirement was for the convenience and personal preference of the Employer. Employer needed to demonstrate that the job requirements bore a reasonable relationship to the occupation in the context of the employer's business and were essential to perform, in a reasonable manner, the job duties as described by Employer. (AF 24).

Employer submitted rebuttal on May 1, 1998. (AF 16). Therein, Employer's General Manager stated her disagreement with the assessment that familiarity with brand names is not normally required for the successful performance of this job in the United States. Employer claimed that requiring a machine maintenance mechanic to be able to repair and maintain the equipment it operates in its facility was a business necessity. In Employer's opinion, it would be ludicrous to require a mechanic to be skilled in machinery Employer did not operate or to hire someone unfamiliar with industry standard equipment. (AF 16). Employer also contended that its failure to list the restrictive requirements in the newspaper advertisement actually enhanced the possibility of more applicants as opposed to limiting same. It was Employer's position that requiring that a mechanic have experience on a specific type of equipment is not in the least bit restrictive when it is essential to the normal and standard operation of a business. Employer asserted that mentioning the specific machinery used by it in the original application was strictly based on business necessity and had no bearing on convenience or personal preference. (AF 16-17).

The CO issued a Final Determination ("FD") on July 27, 1998, denying certification. (AF 12). The CO pointed out that the purpose of the published advertisement is to inform the readership of the total requirements for the job, so that U.S. applicants are not surprised by the employer's revealing one or more requirements that were not made known through the advertisement. The CO found Employer's statement that "it would be ludicrous to require a Mechanic to be skilled in machinery we did not operate or to hire someone unfamiliar with industry standard equipment," indicated that the job was not truly open to a U.S. worker. (AF 13). Employer had failed to produce any evidence to show that the same type and brands of machinery were used in similar manufacturing plants in the United States. The CO found Employer's self-serving statement to that effect to be the only reference thereto. Having found that Employer had not demonstrated that the inclusion of brand

name equipment was common for the industry, or that the requirement of familiarity with certain brand name equipment was presented in a format which was made readily apparent to job applicants, labor certification was denied. (AF 13-14).

On August 7, 1998, Employer filed a Request for Review of Denial ("Request") with the Board of Alien Labor Certification Appeals ("Board" or "BALCA"). (AF 3).

DISCUSSION

In the Request, Employer's general manager argues that the requirement at issue stems from legitimate business necessity in the industry, and is not unduly restrictive. She states her agreement with the CO's finding that Employer failed to produce evidence that the same type and brands of machinery are used in other manufacturing plants in the United States involved in the same type of production, however, she contends that no such evidence was requested. (AF 3-6). Claiming to have previously assumed that an explanation of the business necessity and the commonality of this requirement would be considered "justification," Employer's general manager states that she now understands what the CO was requesting. (AF 4). She has included with the Request a list of other manufacturing companies which allegedly utilize the same type of machinery. (AF 7). Finally, Employer denies any attempt to deceive applicants by its failure to list the brand name machinery familiarity in its advertisement. (AF 5-6).

Employer's documentation, which was not provided to the CO, will not be considered by this Board. Our review is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. § 656.27(c); *see also* 20 C.F.R. 656.26(b)(4); *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Furthermore, where an argument made after the FD is tantamount to an untimely attempt to rebut the NOF, the Board will not consider that argument either. *Huron Aviation*, 1988-INA-431 (July 27, 1989).

Section §656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. An employer cannot use requirements that are not normal for the occupation or are not included in the Dictionary of Occupational Titles unless it establishes a business necessity for the requirements. The purpose of section 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Rajwinder Kaur Mann*, 1995-INA-328 (Feb. 6, 1997).

Employer can establish a business necessity by showing that (1) the requirement bears a reasonable relationship to the occupation in the context of the Employer's business; and (2) the requirement is essential to performing, in a reasonable manner, the job duties as described by the Employer. *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989)(*en banc*).

In order to demonstrate business necessity an Employer must show factual support or a compelling explanation. *ERF, Inc.*, 1989-INA-105(Feb. 14, 1990). Unsupported conclusions are insufficient to demonstrate that the job requirements are supported by business necessity. *See Alfa Travel*, 1995-INA-163 (Mar. 4, 1997). A letter merely stating that the items listed in the ETA 750 are "critical," without supportive documentation is insufficient. *Princeton Information Ltd.*, 1994-INA-57 (July 5, 1995). The instant case is no different. Employer claimed the requirement of familiarity with brand name equipment, was a business necessity, but failed to provide specific documentation or a compelling explanation sufficient to establish that the requirement is indeed essential to perform the job. The claim of Employer's general manager that she did not understand what was required to successfully rebut the NOF is not compelling. The NOF clearly advised Employer as to the deficiencies in the application, the regulations violated and the rebuttal required. The first page of the NOF advised that rebuttal could be in the form of documentary evidence and/or written arguments. It was Employer's choice how to proceed, and it is noted that Employer had the benefit of counsel when preparing its rebuttal.

Employer failed to establish business necessity for the requirement determined herein to be unduly restrictive. Labor certification was properly denied, and the remaining issue need not be addressed.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board
of Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.